SOME DEFINITIONS AND QUESTIONS IN JURISPRUDENCE.

IN every branch of knowledge a tolerably accurate terminology is not only an aid to progress, but is also a preservative from corruption. A loose vocabulary is a fruitful mother of evils. It would be difficult to overestimate the harm wrought by the ambiguity of such terms as "the church" in theology, and "humors" in medicine.

In law, however, the evil of lax definitions, though real, has not been without compensation. Men are very ready to accept new ideas, provided they bear old names; and the indefiniteness of many legal terms has been the cover under which improvements have been worked insensibly into the law, — improvements which would have been made more slowly, if at all, had the terms borne a more rigid meaning. If the words "contract," "consideration," "tort," "trust" had been defined by Statute four hundred years ago, a serious obstacle would have been put in the way of legal development.

As knowledge grows in any department, the classification in that department changes; and with a change in classification is involved a change in the meaning of terms.[1] So long as the object of knowledge is alive, there can be no final definitions; and it is the truth of this which furnishes so strong an argument against schemes of codification. But although it be true that classification must and ought to change as the law grows, and an official attempt to fix it is pernicious, it by no means follows that it should not be unofficially investigated.

If we are moving in the right direction, there is a constant possibility of improvement in stating and arranging the law; and although we recognize, in all humility, that any statement and arrangement will some time be superseded, it is a step for further advance to see what has been won from chaos already.

The analysis of the general conceptions of our law is not a study which has much flourished in England or America. There was little of it before the time of Bentham and Austin. Austin's book

[1] 1 Mill, Logic (9th ed.), 159.

was known to but a narrow circle, and had become a bibliographical rarity when it was republished by his widow, with additions, in 1861. It was then considerably in vogue until 1874, when Sir Henry Maine dealt it a severe blow in his last two lectures on the "Early History of Institutions," since which time its credit has been sensibly shaken.

Later excellent treatises have been published by Professor Holland and Sir William Markby, and valuable essays by others, notably by Sir Frederick Pollock in a collected volume, and by Mr. Justice Holmes in the "American Law Review;" but aside from books intended for practitioners, the writers who in England and America have illustrated the jurisprudence of our generation have approached the law mainly from the historical side.

The brilliant results of research into the history of the law, the fascinating character of the research itself, and the general acceptance, often in an extravagant form, of the philosophy of evolution, have drawn attention to the change and growth of the law, and away from the elements of permanence which it contains. It is rather the question of how law has become what it is, than the question of what it in fact is now, that has attracted the attention of writers. It has been the growth of the tree of the law, and not the appearance of a cross section at the present or any other time that has occupied them.

I by no means regret this, and I fully recognize the fact that legal conceptions are constantly changing; yet, to borrow a figure from the shop, it seems well at times to take account of stock, and to consider where legal studies and investigations have in fact brought us, although we believe it is neither possible nor desirable to prevent their carrying us farther.

Besides, as one should remember, though most legal conceptions alter, and there may be few which are so based on eternal principles that they cannot change while the order of nature continues, yet their change is often exceeding slow, and many of them go back as far as we have a clear knowledge of human affairs, and show to our eyes no signs of decay.

The analytical study of the general conceptions of the law is not, as experience has shown, without its dangers. It may easily result in a barren scholasticism. "Jurisprudence," as Mr. Dicey says,[1] "is a word which stinks in the nostrils of a practising barrister. A

[1] 5 Law Mag. and Rev. (4th series), 382.

jurist is, they constantly find, a professor whose claim to dogmatize on law in general lies in the fact that he has made himself master of no one legal system in particular, whilst his boasted science consists in the enunciation of platitudes which, if they ought, as he insists, to be law everywhere, cannot in fact be shown to be law anywhere." But, as Mr. Dicey in the same article goes on to show, "prejudice excited by a name which has been monopolized by pedants or impostors should not blind us to the advantage of having clear and not misty ideas on legal subjects."

Especially valuable is the negative side of analytic study. On the constructive side it may be narrow and unfruitful; but there is no better means for the puncture of wind-bags. Most of us hold in our minds a lot of propositions and distinctions, which are in fact identical, or absurd, or idle, and which yet we believe or pretend to ourselves to believe, or impart to others, as true and valuable. If our minds and speech can be cleared from these, it is no small gain.

This is the great merit of Austin. His style is inexpressibly wearisome. He himself once expressed a doubt whether his love-letters were not written in the fashion of an equity draughtsman; and certainly his treatise is in manner more like the charging part of a bill in equity than any other kind of human composition. The insolence of his language also — though very likely not of his thought — is often offensive, and the theories which he advanced have not remained unshaken. But his unwillingness to let others juggle with words or to juggle with them himself, or knowingly to leave any dark corner of a subject unexplored, have never been surpassed, and to many students have made the reading of his crabbed book a lesson in intellectual morals.

I wish in this article to put one or two definitions and propositions, rather as suggesting them for consideration, than as positively affirming them to be true.

I. Jurisprudence is the Science which deals with the Principles on which Courts ought to decide Cases.[1]

Every society or organized body of men must have a judge or judges to determine disputes. Sometimes the duties of judge are united in the same person with other official duties. The more

[1] It may be urged that this definition is much as if medicine were defined as the science which deals with the principles on which physicians ought to diagnose and treat

civilized the society becomes, the more do the functions of a judge come to be exercised apart from other functions.

"The law" or "the laws" of a society are the rules in accordance with which the courts of that society determine cases, and which, therefore, are rules by which members of that society are to govern themselves; and the circumstance which distinguishes these rules from other rules for conduct, and which makes them "the law," is the fact that the courts do act upon them. It is not that they are more likely to be obeyed than other rules. I am much more likely to drive over a country bridge at a gait faster than a walk than I am to wear a nose-ring, although the former is against the law, while the latter is not. It is not that they relate to more important matters. To take Macaulay's instance, it is against the law for an apple-woman to stop up the street with her cart; it is not against the law for a miser to allow the benefactor to whom he owes his whole success to die in the poor-house. Acts are against the law or not against the law in any case because the courts will or will not enforce the rules of conduct with which such acts conflict.

It may be said that "the law" comprises the rules of conduct which are authorized or enforced by the State whether through the courts of law or not. Thus it is the law that I can shoot a burglar who is breaking into my house, or can call upon a policeman for aid against a robber. But the limits of this right to self-help and to aid from the executive officers of the State are defined by the courts; and the courts, by preventing any one taking action against me for the shooting of the burglar or the arrest of the robber, are the authorities through which the State ultimately enforces all rules of conduct which it does enforce.

The power, then, of a man to have the aid of the courts in carrying out his wishes on any subject constitutes a legal right of that man, and the sum of such powers constitutes his legal rights.

1. I have approached the subject of jurisprudence from the side of the courts, and have defined it with reference to them. Austin and his followers make the idea of the sovereign the central idea of jurisprudence.

diseases, that it is, so to speak, a clinical definition. If physicians occupied the same position towards the laws of nature as judges do towards the law of the land, and had received commissions from the Creator as official expounders of those laws; if when a board of doctors said that a man had a colic, he *ipso facto* did have a colic, — then the cases would be similar, and the definition of medicine not, I conceive, objectionable.

Jurisprudence, according to Austin, is the science of positive law; positive law is the aggregate of positive laws; and positive laws are the sanctioned commands of the sovereign. That there is much positive law made by judges he does not deny, but he brings all such law within his definition by aid of the proposition that the judges, in so making law, are acting as agents of the sovereign.

But this meaning of the term "jurisprudence" is not the meaning which it commonly bears.

That *a* positive law is the command of the sovereign will be generally acknowledged; but "the law" which is the subject of jurisprudence is not, as the term is generally understood, the aggregate of these commands; it does not comprise all these commands, and it does comprise much besides.

A. *"The law," which is the subject of jurisprudence, does not comprise all the commands of the sovereign.* Nothing is more plainly a command of the sovereign than the manual of infantry tactics or the regulations for making post-office returns; and these would be, under Austin's definition, most important parts of the science of jurisprudence; yet, as the term is ordinarily understood, they certainly do not come within its scope.

It cannot be said that such commands are local and special, and therefore unfit for general jurisprudence. A comparative science of infantry tactics is perfectly possible; so is a general science which should comprise the general principles involved in all actual systems of tactics, — indeed, he would be a bold man who would deny that some of the principles of the goose-step and of the manual of arms go down to the roots of human nature quite as deep as many of the principles in the law of contracts or of torts.

And if jurisprudence, defined as the science of the commands of the sovereign, is to be extended to include judge-made law, it ought to be extended to include colonel-made and postmaster-made law, and to all general rules made by officers of the sovereign.

But the manual of tactics is really no part of jurisprudence. Jurisprudence includes those commands of the sovereign, the main object of which is to define and enforce rights. It does not include those commands, the main object of which is to furnish the machinery for effecting other ends; for instance, the building of roads, the distribution of letters, the maintenance and drilling of an army. To determine the main object of many commands is not

always easy; and therefore the precise line of demarcation between those commands which fall within the province of jurisprudence, and those which do not, may be hard to draw, but practically, most cases will give no trouble: the manual of tactics certainly falls outside.

B. *"The law," which is the subject of jurisprudence, comprises much besides the commands of the sovereign.* That "the law" is made up largely of judge-made law, all agree; Austin brings judge-made law under the commands of the sovereign by his apothegm that the judge in making law is acting as a delegate of the sovereign. The forced character of this rule has always been a stumbling-block in the way of his disciples, and Sir Henry Maine has shown that in some societies it cannot, by any forcing, be brought into accordance with the facts.

"It is founded on a mere artifice of speech, and assumes courts of justice to act in a way and from motives of which they are quite unconscious. . . . There have been independent political communities, and indeed there would still prove to be some of them, if the world were thoroughly searched, in which the sovereign, though possessed of irresistible power, never dreams of innovation, and believes the persons or groups, by whom laws are declared and applied, to be as much part of the necessary constitution of society as he is himself. There have again been independent political societies in which the sovereign has enjoyed irresistible coercive power and has carried innovation to the farthest point, but in which every association connected with law would have violence done to it if laws were regarded as his commands. . . . Let it be understood that it is quite possible to make the theory fit in with such cases, but the process is a mere straining of language. It is carried on by taking words and propositions altogether out of the sphere of the ideas habitually associated with them." [1]

One decided gain in approaching the law from the side of the courts instead of from that of the sovereign is that the determination of the sovereign in a particular society is often a matter of extraordinary difficulty, while no such trouble exists in the case of courts.

Another advantage in connecting jurisprudence with the courts as its central idea, instead of with the sovereign, is that it then corresponds with the learning which is held by a particular class in the actual constitution of a community. We do not go to a judge

[1] Maine, Early History of Institutions, 364, 365.

or to a lawyer to learn how many inches the recruit's step should be, nor on what blanks a postmaster should make his returns. But it *is* the function of judges and lawyers, which they more or less fulfil, to know the rules by which courts ought to decide cases.

Closely connected with Austin's idea of referring jurisprudence to sovereignty is his theory that a sovereign has no rights. This, like his notion of judge-made law emanating from the sovereign, has wrung but a reluctant assent from his followers.

He reaches his result thus: A person has a legal right when another or others are bound or obliged by the law to do or to forbear towards or in regard of him. To every legal right there are three parties, — "a party bearing the right; a party burdened with the relative duty; and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed." A legal right is the creature of law, of a sovereign command; and as a sovereign cannot issue commands to itself, so a sovereign can have no rights.

If, however, we define a right by saying that "a person has a legal right when another or others are compelled by the courts to do or to forbear towards or in regard of him," then the sovereign has rights, and the nomenclature of jurisprudence corresponds to legal and common parlance.

2. Jurisprudence, then, is the science which deals with the principles on which courts ought to decide cases. The deontological element has often been excluded from the definition of jurisprudence; it has been declared that jurisprudence is not like ethics, the science of what ought to be, but simply the science of what is.

"Jurisprudence is concerned with positive laws, or with laws strictly so-called, as considered without regard to their goodness or badness." [1]

"This distinguishes the science in question from the science of legislation, which affects to determine the test or standard (together with the principles subordinate or consonant to such test) by which positive law ought to be made, or to which positive law ought to be adjusted." [2]

Jurisprudence "is the science of actual, or positive law." [3]

But this is not the meaning commonly attributed to the word, nor does there seem any reason for excluding the element of what

[1] Aust. (4th ed.) 176, 177. [2] 2 Aust. (4th ed.) 1107.
[3] Holland (5th ed.), 12.

ought to be; for by excluding that element, we exclude the whole future of the science, and shut it up to a dry enumeration of past achievements. To do so is like confining chemistry to the elements and compounds already known, and saying to an investigator who is in search of some new combination that he is stepping outside the limits of the science.

Suppose two tribunals of co-ordinate authority in the same country have pronounced opposite opinions, and the supreme judicial authority may not have spoken. Suppose, for instance, that two Circuit Courts of the United States put opposite interpretations on the same Statute, and the Supreme Court has never had the question before it, does not the jurisprudence of the United States extend to the consideration of how that question *ought* to be determined?

Again, a question may not have been decided in the courts of a country; for instance, in Massachusetts the effect of certifying a check on the drawer's liability has never been determined: but would not a Massachusetts "jurist" be strictly within his province in considering it? Is it the "practitioner" only who is entitled to have an opinion upon it?

Thus to limit jurisprudence is to take from it its chief interest and glory. The supposed immutability of its principles was what once gave it its dignity and charm; to-day it owes them rather to its possibilities and prospect of boundless development.

II. Much in the Law that is commonly attributed to Custom ought really to be attributed to the Opinions of the Judges on Questions of Morality.

It is such a commonplace that (apart from Statutes) custom is the source of the law, or, indeed, is the law itself, that this proposition will to many seem paradoxical.

What, then, are the sources of the law, or, in other words, the sources from which courts draw the rules by which they decide cases?

1. The commands given, through its legislative organs, by the State, whose judicial organ the court is.[1]

There is in each State a person, or generally a body of persons,

[1] If a State, through its legislative organ, issues a command that it has been forbidden to issue by a person or body which the courts of the State consider as having political authority superior to the State, then those commands will be disregarded by the courts. This is the case in confederated States.

which is the main legislative organ, — a Parliament, Congress, Cortes, Assembly. But other persons or bodies are also charged with legislative functions (usually of a less weighty character); for example, the head of the administration of a State has often power to issue proclamations or orders; a city can make ordinances; the courts themselves can regulate procedure; thus the power of the Supreme Court of the United States to make rules for the conduct of equity and admiralty causes in the Federal courts is, as exercised, a legislative power of great extent and importance.

It is unnecessary here to consider when Statutes begin to be in force, and when they cease to be so. As long as they continue they are binding on the judges.

2. After legislation come *precedents*. When a legal point has once been decided in a case by a court of law in any State, that decision is a reason for the point's being determined in the same way by every court of that State which is not of higher authority. That such a decision should have a weight apart from its intrinsic merits, is almost a necessity in any system of law; but the degree of weight varies very much in different systems, — it is much greater, for instance, in the common than in the civil law.

3. Decisions on the same point by inferior tribunals in the same State or by the courts of other States may also have an artificial importance beyond their intrinsic excellence. Here, however, the range is broader, and sometimes the added value is next to nothing. For instance, in a case before the Court of Appeals of New York, the fact that the point involved had been ruled one way or another by a justice of the peace in a remote country village would be of almost infinitesimal importance; but on the other hand, if a point of commercial law had been determined in the same way by the courts of all of the United States but one, in which one it had never arisen, this unanimity of decision would be well-nigh conclusive with the courts of that one State when the question should at last come before them.

4. Next come the treatises; these, again, carry much greater authority in some systems of law than in others; for instance, in the civil than in the common law.

5. The processes of inferential and analogical reasoning by which the courts evolve new principles from old cases. These are well discussed by Mr. E. R. Thayer in an article on "Judicial Legislation" in the last volume of this review.

6. That the above-named are sources of the law, no one will dispute. But they are not all the sources. What is the remaining one? The common answer is, Custom. I venture to think that custom, as such, has comparatively little influence on the law, and that the great additional factor is the opinions of the judges on questions of morality. In morality, I may as well say once for all, I include public policy; that is, what *ought* to be done for the good of the community.

How should a judge — how, in fact, does a judge — decide a case? *First*, he sees whether there is any Statute on the subject; if there is, that concludes him. *Secondly*, he seeks for precedents binding him, which, either directly or by necessary reasoning or controlling analogy, involve the determination of the case. If he finds such, that is the end of the matter. His conscience has been called into action only so far as to require him to bring an honest and unprejudiced mind to the interpretation of the Statutes and precedents; he may think the Statutes and precedents immoral, but he has no compunction in following them. Grant intellectual honesty to the Devil, and the Devil, going so far only as we have already gone, would make an excellent judge.

Thirdly. But suppose the judge finds no Statute and no precedent governing the case, what is he to do? He must decide it somehow. Occasionally a question may come before a court where the scales hang perfectly even, where the moral considerations on one side exactly balance the moral considerations on the other. Again, a question may arise which has no conceivable moral aspect; but such questions are so few that they may be safely neglected. The case being then before the judge, and he being of opinion that sound morality requires that judgment should be given, say, for the plaintiff, does he not, and ought he not, to decide accordingly? What can be a justification for deciding against what he thinks good morals call for? It is a justification, we have seen, that there is a Statute or binding decision the other way. But is there anything else which is a justification? Is it a justification that a custom prevails in the community of doing acts which the judge thinks, if there were no such custom, ought to be restrained by the law as immoral? Suppose a judge should say: "Here is a practice in support of which there is neither Statute nor precedent; it is a practice which I should restrain as immoral, except for the fact that it *is* a practice; but as it is a practice, I shall not restrain it." Ought a judge so to act? Do judges so act? Would not a judge

intentionally sacrificing his own ideas of what is right to the popular practice be deemed to have failed in his duty? Doubtless what is right conduct varies with circumstances. Thus it is a duty not to needlessly wound another's feelings; but an act may be conventionally an insult in one country, whereas in another country it may be indifferent or complimentary, and therefore it may be against public policy for the courts of the former country to allow the act to be committed, while no such view of public policy may obtain in the latter. The same act may be moral under some circumstances and immoral under others; but it is the morality or immorality of the act, and not the fact that the circumstances are so or otherwise, that determines and should determine the judgment of a court.

A court generally decides in accordance with custom, because a community generally thinks its customs right, and a judge shares the moral sentiments and prejudices of the community in which he lives: the custom and the judge's ethical creed are usually identical; but which of the two is the real source of the law is shown in the cases where they differ. Where the custom is one way and the judge's judgment of what is moral is another way, the judge follows the latter, and disregards the custom. He would not so disregard a precedent, still less a Statute. Judges constantly are following Statutes and precedents which they consider pernicious; but has it ever been heard that a judge declared a custom to be without precedent in the courts and pernicious, and yet followed it? On the contrary, judges constantly refuse to follow customs which they deem unreasonable, *a fortiori* customs which they deem immoral; that is, they set their judgment of whether a practice is reasonable and moral higher than the mere fact of the practice as a source of law.

It may be said that although customs, as customs, are not much taken up into the law at the present day, they were so formerly. Perhaps they were; the subject is worth careful examination. Meanwhile it is well to bear some things in mind.

1. Probably in the early times to trace the descent of law from custom is often to reverse the real historical process.

"A custom [is] a conception posterior to that of Themistes, or judgments. However strongly we, with our modern associations, may be inclined to lay down *a priori* that the notion of a custom must precede that of a judicial sentence, and that a judgment must affirm a custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them." [1]

[1] Maine, Anc. Law, 5.

2. So far as mercantile customs have been adopted into the common law, it has been upon the same grounds on which evidence of usage in particular trades is to-day admitted; that is, to carry out the intention of the parties. In the case of sale on the Stock Exchange, a court allows evidence of the usages of the Exchange to be given, not because it cares in the least for those usages as usages, but because they are facts relevant in the case to show the intention of the parties, and the moral sense of the judges feels that justice requires such facts to be taken into account. This same reason — the moral sense of the judges that honesty and fair dealing require it — explains the taking up of the customs of merchants into the law; and accordingly, as we should expect, these customs relate to matters of contract.

3. With a great part of the law the customs of the people have obviously had nothing more to do than have the motions of the planets. The enormous mass of the law of pleading and of evidence has been born and bred within the four walls of a court. The community at large, those who make custom, know absolutely nothing about it. So with a great part of those legal rules which are not plainly of an ethical character. For instance, is the rule in Shelley's Case a product of "the common conscience of the people;" or the rule that "dying without issue" means on an indefinite failure of issue; or is the rule that a parol promise without a consideration cannot be enforced, a spontaneous evolution of the popular mind? When the rules of common law and chancery differ, which are to be considered those "of which the people have the knowledge of the necessity as law"? In New York a contract is, I believe, complete when a letter of acceptance is mailed; in Massachusetts, not until it is received. Is the common conscience of the people of New York different on this point from the common conscience of the people of Massachusetts? Does the fact that A, B, and C, happen to be judges instead of D, E, and F change the ideas "of which the people have knowledge of the necessity as law"? In truth, the theory that custom is the parent of the non-legislative part of the law seems to weaken the more one applies it to actual instances.[1]

[1] So far as the law has been already determined, it seems proper to say that Statutes, precedents, and the opinion of judges on questions of morality have been its principal sources; but when we are speaking of questions yet unsettled, it is perhaps more correct to say that the sources for their determination are Statutes, precedents, and the principles of morality, and to speak of the judges as Mr. Carter does in his admirable address on the "Provinces of the Written and Unwritten Law," as discoverers only of those

The formative elements, then, of the law are mainly legislation and the opinion of the judges on matters of ethics and public policy; the effect of the latter is often obscure, and judges themselves have a deprecatory habit of minimizing it, and of speaking as if their sole function was to construct syllogisms; but, to say nothing of former times, a great part of the law of this century is due to the opinions of individual judges on ethical questions. This, as I have said, is not obvious on many points, for on many points all decent people are agreed; but where there is room for difference of opinion, it becomes plain how much of the law is due to the notions of morality and policy held by particular courts. A great part of constitutional law comes under this head. Few constitutional questions have been decided, because the rules of logic necessitated the results reached; and in many cases the application, in addition, of the ordinary rules of interpretation would not have enabled the courts to come to their conclusions. It is a curious matter of speculation how different might have been the development of constitutional law if Chief-Justice Marshall had been as ardent and relentless a republican as he was a federalist.[1]

So beyond the realm of constitutional law. The article of Mr. Thayer, above referred to, shows very clearly what a hand the notions of the courts on public policy have had in extending and limiting the doctrine of Rylands *v.* Fletcher; so too as to Lumley *v.* Gye and as to the whole domain of the non-liability of masters for the acts of fellow-servants. Again, the allowance of spendthrift trusts in Pennsylvania and Massachusetts; the permission to men to give property to their wives, so that on their insolvency their creditors may not get it; the preference of domestic to foreign creditors; the refusal to carriers of leave to contract against the negligence of their servants, — are all cases, and there are innumerable others, where American courts, unfettered by legislation or precedent, have made law in accordance with their views of what sound ethics required or permitted.

principles. The point that I have desired to make in the text is that it is the judges who have been mainly the discoverers of these principles, and not "the common conscience" of the people.

[1] I am indebted to Mr. Justice Holmes for the following quotation from a pamphlet by Bishop Hoadley in the Bangorian controversy, which shows that gentlemen of the short robe have sometimes grasped fundamental legal principles better than many lawyers: "Nay, whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *He* who is truly the *Law-Giver* to all intents and purposes, and not the person who first wrote or spoke them."

III. PARTICULAR, COMPARATIVE, AND GENERAL JURISPRUDENCE.

1. *Particular Jurisprudence.* — I have thus far used "jurisprudence" as a term applicable to the decisions of the courts of a particular country, and have assumed that such an expression as "the jurisprudence of Italy" is correct. And notwithstanding Professor Holland's criticism,[1] I venture to think it desirable to have an expression for the science which teaches how the courts of a particular country ought to decide cases.

Indeed, there seems no objection to the usage which Professor Holland mentions as springing up in France of referring to the "jurisprudence" of a particular tribunal in the sense of "La manière dont un tribunal juge habituellement telle ou telle question." Nor is it necessary that the courts in question should derive their authority from any territorial sovereign; "ecclesiastical jurisprudence" is a correct phrase, and we may appropriately speak of "masonic jurisprudence," or of the "jurisprudence of Knights of Pythias," if such organizations have courts with judicial functions.[2]

But although particular jurisprudence may thus be the jurisprudence of a non-political body, it commonly means the jurisprudence of a particular political community.

2. *Comparative Jurisprudence* is the systematic comparison of the rules upon which different tribunals ought to decide cases, for the purpose of discovering the elements of resemblance and difference.

There are two great bodies of law between which such comparison is profitable, — the Roman law, and the English common law. There are other systems which are derived from neither the Roman nor the English; for example, the Egyptian, the Jewish, the Greek, the Persian, the Chinese, the Patagonian. Of many of them we know little, and what we do know indicates that further knowledge will be valuable in explaining and illustrating former stages of law, rather than in aiding in its future development; for

1 Jurisprudence (5th ed.), 2–5.

2 Jurisprudence, it is true, is often used in a sense which it is impossible to defend. There are certain treatises or handbooks, many of considerable merit, containing those facts likely to arise in lawsuits with which the members of certain professions or trades are, or ought to be, familiar; such books are often called treatises on jurisprudence. Thus, works on "medical jurisprudence" are *vade-mecums* for lawyers and doctors, containing a mass of useful information on poisons, parturition, malingering, etc., but are without any scientific unity, or any pretension to be considered "law" at all. So in France they speak of "veterinary jurisprudence;" and there is no reason why, in like manner, we should not have "plumbers' jurisprudence" or "jockeys' jurisprudence."

in none of them has law ever grown beyond a relatively early state.

But though few fruitful fields for comparative analysis are likely to be found outside the limits of the common and Roman law, there are plenty of them within those limits. The European countries, except England, derive their law from the Roman, and all of the United States, except Louisiana, have systems based on the common law; yet in all these countries and States the law has developed in very varied forms, so that they furnish ample scope for the promotion of studies in comparative jurisprudence.

3. *General jurisprudence:* what does it mean, and what is its value, as distinguished from comparative jurisprudence? It may mean one of three things. *First*, those general principles which are necessary, because founded in immutable human nature. General jurisprudence, in this sense, is part of anthropology. I am certainly not going to deny that there are such principles; but if they exist, we know very few of them, and these very elementary, entirely insufficient with which to build the slightest legal structure. Treatises on general jurisprudence seldom get beyond the first chapter without introducing matter which is borrowed from one or more special systems, and which is obviously not *necessary*.

Second. It may mean the principles upon which all courts, apart from their special surroundings, ought to decide cases; that is, the way in which the legal rights and duties of men without Statutes, without precedents, without institutions, without a history, without clothes, without language, ought to be determined. Such speculations were at one time much in vogue. But this jurisprudence of "forked radishes" is now less esteemed.

Third. It may mean the principles upon which the courts of all countries do in fact decide cases. But whether the law of the Tongooses agrees with the common and civil law in requiring delivery to make a *donatio causa mortis* valid, and whether the chancellor of Dahomey regards conditions in constraint of marriage as *in terrorem* only, are matters upon which we have, I believe, no exact knowledge. The list of legal principles which are actually applied in all the nations and tribes of the earth will not probably be long; but the knowledge necessary definitely to form it, if it be deemed desirable to form it, can hardly be expected in this generation.[1]

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[1] See a sensible article by Mr. Buckland, "Difficulties of Abstract Jurisprudence," 6 Law Quart. Rev. 436.